RECENT CASE NOTES

AGENCY—MASTER AND SERVANT—"RESPONDEAT SUPERIOR"—SCOPE OF EMPLOYMENT.—The plaintiffs rented space in their garage to the defendants. The servant of the latter, while drawing gasoline for his masters' car, lighted a cigarette and negligently dropped the blazing match into a pool of the fuel. The resulting conflagration destroyed the building. The plaintiffs sued the defendants for the damage. *Held* (on other grounds), that the defendants were liable but that the servant's smoking was not within the scope of his employment so as to render his masters responsible for the consequences thereof. *Jefferies and A. and R. Atkey and Co., Ltd., v. Derbyshire Farmers, Ltd.* (1920, K. B.) 36 T. L. R. 825.

The court followed the law as laid down in a previous decision: that, if a master gives a servant certain work to do, he necessarily trusts him for the manner in which it is to be done; and he is consequently held liable for the tort committed by the servant, provided that it was not done from caprice, but in the course of this employment. *Bayley v. Manchester, Sheffield and Lincolnshire Ry.* (1872) L. R. 7 C. P. 415. The court then decided that smoking was not necessary to the proper accomplishment of the defendants' business and was, therefore, not within the scope of the servant's employment. The basis of the liability imposed by the doctrine of *respondeat superior* has been stated as resting on the authority, or implied authority, from the master to the servant to do the act in question. *Attorney General v. Siddon and Binns* (1830, Exch.) 1 Tyrw. 41. It has also been said to rest on the fact that the act was done "for the master's benefit." *Barwick v. English Joint Stock Bank* (1867) L. R. 2 Exch. 259. But these reasons fail in cases where the liability is imposed on the master even though the servant's act was expressly contrary to his instructions, or even though the act was malicious and not at all to the benefit of the master. *McCann v. Consolidated Traction Co.* (1897) 59 N. J. L. 481, 36 Atl. 888; *Williams v. Southern Ry.* (1903) 115 Ky. 320, 73 S. W. 779. The doctrine seems rather to rest on the broader foundation of public policy, that a means is required of forcing masters to keep continual watch over the conduct of their servants, so that irresponsible persons may not be given the opportunity of inflicting damage on others. See Laski, *The Basis of Vicarious Liability* (1916) 26 YALE LAW JOURNAL, 105, 116. It is now universally recognized that the master is responsible for the torts of his servant committed while the latter is acting *within the scope of his employment.* 6 Labatt, *Master and Servant* (2d ed. 1913) 6692; *Roberts v. Kinley* (1913) 89 Kan. 885, 132 Pac. 1180. Torts committed by the servant in the *course* of his employment and in the exercise of his authority, with a view to the furtherance of his master's business, and not for a purpose personal to himself, are within the *scope* of his employment. *Barrett v. Minneapolis, S. P. & S. Ste. M. Ry.* (1908) 106 Minn. 51, 117 N. W. 1047. When the tort is of a fraudulent nature and occurs in the course of the employment, liability is imposed although it was not committed with a view to the furtherance of the master's business. *McCord v. W. U. Tel. Co.* (1888) 39 Minn. 181, 39 N. W. 315. When the servant, at the time of the commission of the tort, is engaged in executing his own private purpose and at the same time is pursuing his master's business, the law will not undertake to fix with precision the line which separates the act of the servant from the act of the individual. *Gracey v. Belfast Tramway Co.* [1901, Q. B.] 2 Ir. 322; *South Covington & C. St. Ry. Co. v. Cleveland* (1907) 30 Ky. L. R. 1072, 100 S. W. 283. Referring now to the principal case, and taking into consideration the universality of the habit of smoking, it would seem that a more reasonable view is that the defendants' servant was pursuing

negligently his masters' business, rather than that he was embarking upon an enterprise all his own. Certainly if the suit were directed against the servant instead of the master, the former could not be sued merely for lighting his cigarette, but for the negligent use of the plaintiffs' premises. See *Williams v. Jones* (1865, Exch. Ch.) 3 H. & C. 602, 610 (dissenting opinion of J. Blackburn). In this country, this question would ordinarily be left to the jury, unless the departure from the employer's business is of a marked and decided character. *Moon v. Mathews* (1910) 227 Pa. 488, 76 Atl. 219; 18 R. C. L. 796.

AGENCY—WORKMEN'S COMPENSATION—INJURIES ARISING "OUT OF AND IN THE COURSE OF EMPLOYMENT"—APPLICATION OF NEW YORK'S "HAZARDOUS" STATUTE.—An employee in a confectionery store was sent by his employer, who was also proprietor of an adjoining saloon, to arrange bail for a customer who had been arrested in the saloon. While at the police station, the employee was pushed downstairs by an officer; and for the injury thus received he sought compensation under the provisions of the Workmen's Compensation Act. The New York act provides compensation for injuries "arising out of and in the course of" certain enumerated hazardous occupations, of which the confectionery business is one. *Held,* (two judges *dissenting*) that the employer was not liable, because, when the accident occurred, that which the employee was doing was not within his contract of employment, and was not such service as is designated as hazardous. *Sabatelli v. De Robertis and Insurance Co.* (1920) 192 App. Div. 873, 183 N. Y. Supp. 796.

Under the English and most of the American compensation acts an injury, in order to be compensable, must have arisen "out of and in the course of the employment." This provision covers injuries received while the workman was doing the duty which he was employed to perform. *McNicol's Case* (1913) 215 Mass. 497, 102 N. E. 697. It also covers injuries received while he was doing additional acts with the consent, or at the direction, of his employer. *Matter of Grieb v. Hammerle & Casualty Co.* (1918) 222 N. Y. 382, 118 N. E. 805. Nor will compensation be denied him if he was injured when he departed from his usual avocation in order to perform some act necessary to be done for his employer. *Hartz v. Hartford Faience Co.* (1916) 90 Conn. 539, 97 Atl. 1020. And the fact that the risk was a common one, such as that of street accidents, is no longer considered material. *Redner v. H. C. Faber & Son Co.* (1918) 223 N. Y. 379, 119 N. E. 842; *Dennis v. White* [1917] A. C. 479. The statutes are remedial and are to be broadly interpreted. See *Matter of Moore v. Lehigh Valley Ry.* (1915) 169 App. Div. 177, 187, 154 N. Y. Supp. 620, 627. The facts of the principal case bring it clearly within these principles, and recovery would have been allowed under almost all of the compensation acts. But New York is one of the few states that requires that the injury be received through a hazardous employment. The earlier decisions were conflicting. Some required that not only the employer's business but also the employee's duties be hazardous. *Matter of Bargey v. Massaro Macaroni Co.* (1916) 218 N. Y. 410, 113 N. E. 407. But others held that the employee's duties need not be hazardous if incidental to the employer's hazardous business. *Fogarty v. National Biscuit Co.* (1917) 221 N. Y. 20, 116 N. E. 346. The amendment of 1916 broadened the scope of the statute along this latter line, and also included injuries received by an employee doing hazardous work in a non-hazardous employment. *Matter of Dose v. Moehle Lithographic Co.* (1917) 221 N. Y. 401, 117 N. E. 616. It seems clearly unreasonable and against public policy to require an employee to stop and consider whether or not the command of his employer involves acts which are not incidental to the employment, in order that he may be certain that he will receive compensation if injured while obeying the order. Cf. *Hartz v. Hartford Co., supra.* It would seem that the principal case is not in accord with sound authority and the spirit